DOCUMENT RESUME

ED 212 417 RC 013 149

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TITLE The Indian Child Welfare Act.
INSTITUTION Indian Centers, Inc., Los Angeles, Calif.
PUB DATE Feb 81
NOTE 13p.; Revised.

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Adopted Children; *Adoption; American Indian Culture; *American Indians; *Child Advocacy; Child Welfare; Court Litigation; Federal Indian Relationship; Federal Legislation; Foster Family; *Foster Homes; *State Courts; Tribal Sovereignty; Tribes
IDENTIFIERS *Indian Child Welfare Act 1978; Parent Rights; Tribal Courts; Tribal Jurisdiction

ABSTRACT

The Indian Child Welfare Act of 1978 (I.C.W.A.) is federal legislation which preempts state law whenever Indian children may be removed from their families. The I.C.W.A. permits Indian tribal courts to decide the future of Indian children, establishes minimum federal standards for removal of Indian children from their families, requires that children removed from their homes be placed with Indian families to protect the continued integrity of Indian culture, and controls all state foster care and adoptive proceedings. For the act to apply, children must be unmarried, under age 18, and members of an Indian tribe or eligible for membership. The act covers foster care, termination of parental rights, pre-adoption proceedings, and adoption proceedings. Two jurisdictional sections grant exclusive or concurrent jurisdiction depending on the domicile of the parent. If it is decided that the child will remain under the state court, the court must meet established minimum federal requirements. If it is determined the child will be placed in foster care or adopted, the child must be placed in a home according to a set order of preferences. For foster care, these are: (1) with the child's extended family; (2) in a foster home licensed/approved by an Indian tribe; (3) in an Indian foster home licensed by a non-Indian authority; (4) in an institution operated by the tribe or Indian organization. Order of preference for adoption is with: the extended family; a member of the child's tribe; other Indian families. (CM)

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INDIAN CENTERS, INC.

Indian Child and Family Resource Center
Legal Representation, Counseling, Foster Home,
Adoptive Home Recruitment, Information, Referral

ED2124417

THE INDIAN CHILD WELFARE ACT

by

KATY JO STEWARD

Revised

February 1981

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The "Indian Child Welfare Act of 1978", 25 U.S.C. 1901 et. seq., (herein cited as I.C.W.A.) is federal legislation which preempts state law whenever an Indian child may be removed from his/her family. The legislation was passed in response to a national crises where an average of one out of three Indian children were being removed from their homes, even though less than one percent of these cases involved abuse of any sort.[1] Most of these children have been placed in non-Indian homes resulting in serious emotional and intellectual damage to the children. The future of the American Indian culture would have been jeopardized if this policy were allowed to continue.[2] The I.C.W.A. prevents this wholesale destruction of Indian families in the following ways: (1), by permitting Indian tribal courts to decide the future of Indian children, (2), through the establishment of minimum federal standards for the removal of Indian children from their families; and (3), through the requirement that children who are removed from their homes be placed with Indian families in order to protect the continued integrity of the Indian culture.

The I.C.W.A. controls all state foster care and adoptive proceedings. In order to determine the rights of all parties to an I.C.W.A. case, four questions should be asked when an Indian child enters the state system:

1. Does the I.C.W.A. apply to this child?
2. If, in fact, the act applies, does the state court or tribal court have jurisdiction?

3. If the matter remains in the state court, what requirements must the state follow?; and

4. If the child to be adopted or placed in foster care, what preferences for placement must be followed?

In response to question number one, the I.C.W.A. does not apply to all Indian children or all custody proceedings. In order for the act to apply, the child must be:

1. Unmarried.

2. Under the age of eighteen.

3. A member of an Indian tribe or eligible for membership and the biological child of a member, 25 U.S.C. §1902(4).

Note, either the child or the parent must be a member of an Indian tribe or the act does not cover the Indian child. Most tribes require enrollment, which is a procedure based on blood quantum which differs from tribe to tribe. Membership can be ascertained by contacting the tribe, or, if the tribal affiliation is unknown, by contacting the local Bureau of Indian Affairs. In Los Angeles County the court always contacts the Sacramento Office of the Bureau of Indian Affairs, when attempting to confirm the membership of the child or parent. This procedure takes approximately 10 days, and has enormously expedited the process of identification of eligible Indian families. One of the major difficulties in implementing the act in urban areas is the problem of who is a native American.

The act also grants parental status to "Indian Custodians". Custodians are defined as anyone a tribal court has given custody to or anyone to whom the parent has given care and control of the child to. 25 U.S.C. §1903. Within Indian cultures children are raised communally. The recognition of "Indian custodians" is simply a codification of this practice. However, it is still the biological parent whose tribal affiliation must be established.

In order for the act to apply to the child, not only must the child qualify, but the type of proceeding must be covered by the act as well. The following types of proceedings are covered by the act:

1. Foster care: Defined as when the Indian child's parent cannot have his/her child returned upon demand. 25 U.S.C. §1905(1)(i).
2. Termination of parental rights. 25 U.S.C. §1903(1)(ii).
3. Pre-adoption proceedings. 25 U.S.C. §1903(1)(iii).
4. Adoption proceedings. 25 U.S.C. §1903(1)(iv).

It is important to note here that the following proceedings are not covered:

1. Voluntary placement where the child must be returned upon the parent's demand. 25 U.S.C. §1903(1)(i).
2. A custody dispute where the child will be placed with the parent. 25 U.S.C. §1903(1)(i).
3. A juvenile delinquency proceeding is not covered. However, the act does apply to status offenses. 25 U.S.C. §1903(1).

Once it is established the I.C.W.A. applies to a particular child, the second question must be considered: should the tribal court or state court decide the matter. First, the tribe must be sent notice by registered mail describing the pending proceeding and the rights guaranteed the tribe under the I.C.W.A. 25 U.S.C. §1912(a) and 44 Fed. Reg. 67588.[3]

The two jurisdictional sections grant exclusive or concurrent jurisdiction depending on the domicile of the parent:

1. A tribal court has exclusive jurisdiction when a parent is domiciled on the reservation, or the child is a ward of the tribal court. Once it is established a parent is a domicilary of the reservation, the matter must be dismissed. 25 U.S.C. §1911(a).

2. If the parent is domiciled in the state, the state court shall transfer jurisdiction to the tribal court upon petition of the tribal court or parent, absent:

   a. Objection by either parent.
   b. Objection by the tribe.
   c. Good cause to the contrary. 25 U.S.C. §1911(b).

The only potential dispute over the transfer of jurisdiction between state and tribal courts concerns the definition of "good cause". The legislative history, with one exception, is silent on what "good cause" might mean. However, possible interpretations of "good cause" are described in the State Guidelines, which were promulgated by the Bureau of Indian Affairs to interpret the act. The guidelines suggest "good cause" not to transfer would be:

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1. An untimely request for transfer.
2. A child over the age of five with no parent available.
3. A child over twelve who does not want the matter transferred.
4. A modified forum non-convenience argument. 44 Fed. Reg. 67591.

The guidelines specifically reject the general argument that the "child's best interests" should prevent transfer. The policy of the act states that the "best interests" of the child are with the tribe. 25 U.S.C. §1901 and 44 Fed. Reg. 67592. The state courts should follow the policy and intent of the act by deferring to tribal court's requests for transfer. The author is concerned that state courts could use "good cause" to defeat the intent of the act that Indian people decide the future of Indian children.[4]

The tribe may also intervene in state court proceedings in order to ensure full protection to their children, without intending to transfer jurisdiction. The right of intervention is absolute and can't be objected to by the state court or the parent. 25 U.S.C. §1911(c).

If it is decided that the child will remain in the state court, the court must then meet the minimum federal requirements established in 25 U.S.C. §1912 and §1913.

When the state is requesting a dependency petition, the court must then meet the following requirements:

1. Remedial Services: Before a child may be placed outside the family home, the petitioner must demonstrate to the court that prior to the proceeding, active efforts have been made to correct the problem within the family.
   25 U.S.C. §1912(a) 44 Fed. Reg. 67592.

2. Expert Testimony: A person experienced with Indian people must testify that continued custody by the parent will result in serious emotional or physical damage to the child.
   25 U.S.C. §1912(e) 44 Fed. Reg. 67593.

3. Evidence Standard: Before a child may be placed in foster care, the petitioner must establish his/her case by a clear and convincing evidence standard. 25 U.S.C. §1912(e). Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or non-conforming social behavior, does not constitute clear and convincing evidence that serious emotional damage is likely to result. The evidence must show the causal relationship between such conditions and the damage likely to result.
   44 Fed. Reg. 67593.

4. The Right to Counsel: Any parent or Indian custodian shall have the right to court-appointed counsel, if indigent. 25 U.S.C. §1912(b).

5. Right to Notice: The tribe and parents or custodian must be notified by registered mail of all proceedings. 25 U.S.C. §1912(a).

6. Right to Examination of Records: Parties to the proceeding have a right to examine all court records upon which any decision with respect to such action may be based. 25 U.S.C. §1912(c).

7. Judicial Determination: All proceedings must be heard by a judge, not a commissioner or judge pro tem.

These requirements, especially the need for expert testimony and remedial services, evidence the concern over the state's intervention into Indian families. The Department of Social Services regulations, which were recently enacted, require that documentation of remedial services be included in dependence of petitioner. In other words, before a petition can be filed, a family must have been offered services, and they must have failed. This would not apply if the child were in serious emotional or physical danger. The petitioner now must meet these minimum standards before the state may take jurisdiction over Indian children.

There is currently a case on appeal from Los Angeles County which will determine when the requirements apply in California courts. The state is arguing the requirements of §1912 only apply at disposition. The author's interpretation is that they apply at ajudication as well as the dispositional hearing. Hopefully, the case will be decided within the year.

The requirements for proceedings terminating parental rights are the same as those for foster care proceedings, except the state must meet the higher evidence standard of "proof beyond a reasonable doubt". 25 U.S.C. §1912(f).

The requirements for state courts also extend to the voluntary placement of Indian children. When any parent or Indian custodian voluntarily consents to foster care or adoption, such consent is not valid unless it is executed before a judge who certifies that the terms and consequences of the consent were fully explained and understood. 25 U.S.C. §1913(a).

The act also makes provisions for adult adoptees who were the subject of adoptive placement, in order that they have access to records informing them of their tribal affiliation. 25 U.S.C. §1917. It is unclear if under the act they also have the right to know who their biological parents were.

If all the requirements are met by the state and it is determined the child will be placed in foster care or adopted, the state must then place the child in a home according to a set order of preferences. The following order of preferences shall be followed absent "good cause" for foster care placement:

1. Placement with the child's extended family.
2. A foster home licensed or approved by an Indian tribe.
3. An Indian foster home licensed by a non-Indian authority.
4. An institution operated by the tribe or Indian organization. 25 U.S.C. §1975(b).

If the child is to be placed for adoption, the state must place the child with:

1. The extended family.
2. A member of the child's tribe.
3. Other Indian families.

"Good cause" not to follow the required placements are discussed in the State Guidelines. They suggest three reasons not to comply with the act:

1. There are no available homes.
2. Extraordinary needs of the child.
3. Requests of the biological parent or child if of sufficient age. 44 Fed. Reg. 65794.

If the state fails to comply with the provisions of the act, all proceedings must be nullified or dismissed upon petition of the parent of the tribe. 25 U.S.C. §1914.

When approaching an Indian Child Welfare Act case, remember the four questions:

1. Does the act apply to this action?
2. Who has jurisdiction?
3. What are the minimum requirements the state must follow?
4. With whom should an Indian child be placed?

This paper does not intend to discuss all sections or potential problems that an I.C.W.A. case might present. It is intended as an initial guide to act. If you should have any questions, please do not hesitate to call the Indian Child and Family Resource Center.

FOOTNOTES:

[1]See "Indian Child Welfare Act of 1977": Hearing before the United States Senate Committee on Indian Affairs on §1214 95 Cong., 1st Ses., 538 (1977).

[2]See Mindell and Guritt, "The Placement of American Indian Children: The Need for Change in the Destruction of American Indian Families" (S. Unger Ed. 1978). This essay was adopted as an official paper by the American Academy of child psychiatry.

[3]Pursuant to public law 280, California tribes do not have tribal courts. However, notice must be sent to the tribe of their right to intervene.

[4]There is a case pending in New Mexico where the state is arguing that it is good cause not to transfer jurisdiction because the tribal court is 150 miles from where the state court action is located.

Juvenile Court
Proceedings

Notice to Parents
Notice to Tribe

Tribe rejects Jurisdiction

Tribe appoints Intervenor
(Party who represents
tribes interests)

Case remains under State jurisdiction.
State must provide:

1. Remedial services to family
2. Expert testimony by person knowledgeable of Indian culture which must show causal relationship between parenting and need for proceedings.
3. Higher standard of evidence.
4. Notice of hearings.
5. Right to counsel.
6. Right to examine records.

State court terminates jurisdiction

Tribe takes jurisdiction and decides action for child

Placement for adoption or foster care by preference

Parent and tribe must be notified when case plan changes, when child is moved, at dependency court hearings